

Before the
FEDERAL COMMUNICATIONS COMMISSION **RECEIVED**
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MAY 15 2002

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Second Memorandum Opinion	)	PR Docket No. 92-257
And Order, Released 4/8/02)	
)	
In the Matter of)	
)	
Applications of	)	File Nos.
Warren C. Havens	)	Group A1:
For New Automated Maritime	)	853032-035 (Guadalupe River),
Telecommunications Systems	)	853036-037 (Lake Mojave),
Dismissed Per	)	853038-042, 044-046, 855043
Second Memorandum Opinion	)	(Brazos River),
And Order, PR Docket No. 92-257	)	853057-58 (South Platte River),
	)	853059-060 (Provo River),
	)	853070-072 (Truckee River),
	)	853175-176 (Upper Chattahoochee),
	)	853190-193 (Upper Rio Grande),
	)	853252-258 (Catawba River)
	)	853460-461 (Hawaiian Islands),
	)	Group A2:
	)	853562-569 (Missouri RBSNP),
	)	853570-576, -578-581 (MCKARNS)
	)	Group B:
	)	53611 (MCKARNS),
	)	853615 (South Platte River),
	)	853667-668 (Owens River),
	)	853669-674 (Kings River),
	)	853675-676 (Highland Lakes),
)	853677 (Mt. Desert Island - Arcadia)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

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ORIGINAL

Mobex Communications, Inc. and its subsidiary, Mobex Network Services, LLC¹ (collectively, Mobex) hereby file their Opposition to the Petition for Reconsideration (Havens's Petition) filed with the Commission on May 8, 2002, by Warren C. Havens (Havens). In support of its position, Mobex shows the following.

Havens's Petition presents a procedural conundrum. Havens addressed his Petition to the Commission, yet he requested reconsideration of an action taken on April 9, 2002 by the Wireless Telecommunications Bureau (the Bureau), namely, the dismissal of the above captioned applications. Havens appeared to request reconsideration of a decision made by the Commission in Amendment of the Commission's Rules Concerning Maritime Communications, 17 FCC Rcd _____ (FCC 02-74 Released April 8, 2002) (the Second MO&O). Insofar as Havens requested reconsideration of the Bureau's action, he failed to direct his pleading to the Bureau. Insofar as Havens's Petition requests reconsideration of the Second MO&O, his filing was premature and must be dismissed.

Section 1.429(d) of the Commission's Rules provides that a "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that date is defined in §1.4(b)," 47 C.F.R. §1.429(d). Rule Section 1.4(b)(1) provides that the period of time for the filing of a petition for reconsideration of an action taken in a notice and comment rule making proceeding begins on "the date of publication in the FEDERAL

¹ The name of Regionet Wireless License, LLC has been changed to Mobex Network Services, LLC.

REGISTER,” 47 C.F.R. §1.4(b)(1). At paragraph 89 of the Second MO&O, the Commission stated that the Second MO&O would be published in the Federal Register. Therefore, insofar as Havens’s Petition requested reconsideration of the Commission’s actions in the Second MO&O, it was premature and must be dismissed.

The note to Rule 1.4(b)(1) provides that “licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of §1.4(b)(2),” 47 C.F.R. §1.4(b)(1) n. 1. Rule 1.4(b)(2) provides that “for non-rulemaking documents released by the Commission or staff . . . , the release date,” 47 C.F.R. §1.4(b)(2), establishes the start of the time period for filing a petition for reconsideration. Accordingly, April 9, 2002, the date of release of the Bureau’s letters dismissing Havens’s above captioned applications, established the start of the period for requesting reconsideration of the Bureau’s action.

Havens failed to raise the only issue which he could have timely raised with respect to the Bureau’s action, namely, that the amendments to the Commission’s Rules adopted on March 13, 2002 had not yet become effective on April 9. Therefore, Havens might have argued that the Bureau’s dismissal action was *ultra vires*. But, Havens failed to raise that issue in a timely manner. All other issues raised by Havens were directed not to the Bureau’s dismissal actions, as such, but to the Second MO&O and the filing of Havens’s pleading was premature with respect to those issues. Therefore, the Commission should dismiss or deny Havens’s Petition with respect to the Bureau’s dismissal actions.

Rule Section 1.429(d) limits the length of any petition for reconsideration in a rule making proceeding to “25 double-spaced typewritten pages,” 47 C.F.R. §1.429(d). Haven’s Petition includes page numbers 1 through 34. Pages 20 through 34 are set single spaced, rather than double spaced, and would extend the pleading even more were they properly double spaced. Although Havens attempted to partition or disaggregate part of his argument into three exhibits, each of the three alleged exhibits is not merely factual, but is argumentative in nature. Therefore all 34 pages should be deemed to be part of Havens’s Petition and the petition should be dismissed for failure to comply with Rule Section 1.429(d).

Mobex believes that the Commission will dismiss or deny Havens’s Petition for any or all of the reasons set forth above. However, in an abundance of caution, Mobex will respond herein to Haven’s position.

Havens’s basic position is that a determination of mutual exclusivity should follow the processing of applications. Havens is simply wrong.

The Commission’s Part 80 Rules do not contain a definition of “mutual exclusivity”, but the Commission’s Part 90 Rules do contain a definition and that definition is a correct statement of the law. Rule Section 90.7 provides that “two or more pending applications are mutually exclusive if grant of one application would effectively preclude the grant of one or more of the others under Commission Rules governing the services involved,” 47 C.F.R. §90.7.

More specifically, in Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, 15 FCC Rcd 22709 (2000), the Commission stated that it had

determined that applications are “mutually exclusive” if the grant of one application would effectively preclude the grant of one or more of the other applications. Where the Commission receives only one application that is acceptable for filing for a particular license that is otherwise auctionable, there is no mutual exclusivity, and thus no auction. Therefore, mutual exclusivity is established when competing applications for a license are filed,

15 FCC Rcd at 22713-14. The Commission’s definition of mutual exclusivity does not include a determination of acceptability of an application for filing. Simply put, two applications are mutually exclusive from the moment that the second application is filed if grant of one would effectively preclude grant of the other. They remain in the state of mutual exclusivity until processed or dismissed. Even their compliance or lack of compliance with basic requirements does not affect whether they are mutually exclusive, because, upon processing, it is always within the Commission’s power to waive defects in an application, see, Constellation Communications, Inc., 12 FCC Rcd 9651(International Bureau 1997).

In Amendment of the Commission's Rules Concerning Maritime Communications, 13 FCC Rcd 19853 (1998), the Commission informed applicants and potential applicants for AMTS licenses that “mutually exclusive applications for high seas and AMTS public coast spectrum cannot be resolved until competitive bidding procedures are adopted for those services, and that such applications may ultimately be dismissed,” 13 FCC Rcd 19856. The earliest of the above captioned Havens applications which can be found on the Universal Licensing System data base was filed on February 16, 2000. Therefore, Havens was on notice

at the time of the filing of his applications that mutually exclusive applications might be dismissed.

Havens's reliance on footnote 266 to the Fourth Report and Order and Third Further Notice of Proposed Rule Making in Matter of Amendment of the Commission's Rules Concerning Maritime Communications; Petition for Rule Making filed by RegioNet Wireless License, LLC, 15 FCC Rcd 22585 (2000) (Third FNPRM) was misplaced. Footnote 266 refers to a limited situation in which an application for a station of a proposed AMTS system might be determined to be not mutually exclusive to any application or group of applications to which the system was otherwise mutually exclusive. Havens did not show that any of his above captioned applications was involved in any such situation.

Havens failed to show that the Commission was obligated to take any processing action beyond the suspension of processing of applications announced in the Third FNPRM, 15 FCC Rcd at 22621. The simple answer to Havens's argument concerning what he sees as threshold issues is that the Commission suspended processing of mutually exclusive applications prior to considering any of the issues raised by Havens which might have resulted in dismissal of any of the mutually exclusive applications. The Commission then dismissed all mutually exclusive applications and there was no need to consider any issue raised by Havens against any of the Mobex applications to which his above captioned applications were mutually exclusive.

At page 14 of his Petition, Havens explained that he “asked only that [his] Applications be treated the same as other applications filed during the transition to a system of competitive bidding under the FCC’s established ruled [sic] governing the filing of applications.” With respect to Mobex applications against which Havens had filed petitions to deny, the Second MO&O gave him exactly what he had asked for, namely, dismissal of the Mobex applications. Any complaint which Havens has had concerning alleged disparate treatment with respect to his above captioned applications was resolved by the dismissal of the applications of both Mobex and Havens by the Second MO&O. In short, the Commission afforded exactly the same treatment to Havens’s above captioned applications as it afforded to the mutually exclusive applications of Mobex. Having received what he demanded, Havens can have no reasonable basis for requesting reconsideration.

Havens’s entire argument concerning 47 U.S.C. §309(j)(6)(E) was based on an overbroad interpretation of the statute. Section 309(j) of the Communications Act of 1934, as amended, concerns only competitive bidding. The Commission’s “obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings” was clearly intended by Congress to apply prospectively to the acceptance of applications which might become subject to competitive bidding. The statute does not require the Commission to revise or even to apply engineering solutions, negotiation, threshold qualifications, service regulations to deal with applications which have been found to appear to be mutually exclusive which could not possibly become subject to competitive bidding.

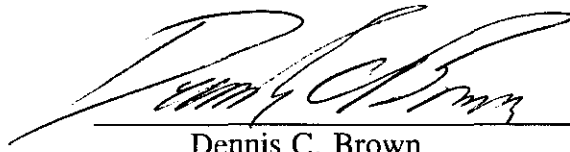
Accordingly, Section 309(j)(6)(E) of the Communications Act is not applicable to the instant matter.

The matter of alleged strike applications discussed at pages 29 through 34 of Havens's Petition need not detain the Commission. Procedurally, pages 29 through 34 are beyond the permissible length of a petition for reconsideration. The Commission should dismiss Havens's Petition for excessive length, but if it does not, it should disregard all pages beyond the twenty-fifth. Substantively, Havens's argument concerning alleged strike applications is immaterial and irrelevant, for the Second MO&O contained no mention of strike applications. As explained, *supra*, where Havens had alleged the filing of strike applications, the Second MO&O gave him the relief he requested by the dismissal of Mobex's mutually exclusive applications.

Conclusion

For all the foregoing reasons, Mobex respectfully requests that Havens's Petition be dismissed or denied.

Respectfully submitted,
MOBEX COMMUNICATIONS, INC.
MOBEX NETWORK SERVICES, LLC

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over a horizontal line.

Dennis C. Brown

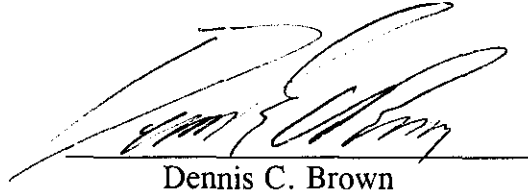
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Dated: May 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this fifteenth day of May, 2002, I served a copy of the foregoing Opposition to Petition for Reconsideration on the following person by placing a copy in the United States Mail, first class postage prepaid.

Warren C. Havens
2509 Stuart Street
Berkeley, California 94705



Dennis C. Brown